

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 7, 2006 Session

**DOROTHY NECESSARY v. LIFE CARE CENTERS OF AMERICA, INC.
D/B/A LIFE CARE CENTER OF JEFFERSON CITY**

**Appeal from the Circuit Court for Jefferson County
No. 19,705 II Richard R. Vance, Judge**

No. E2006-00453-COA-R3-CV - FILED NOVEMBER 16, 2007

This appeal involves the validity of an arbitration agreement entered into by Dorothy Necessary ("Plaintiff") while signing documents on her husband's behalf to have him admitted to a skilled nursing facility. Plaintiff had her husband's oral express authority to sign all paperwork necessary for his admission to the facility. Plaintiff claims, however, that this express authority did not include the power to enter into an arbitration agreement on her husband's behalf. The Trial Court agreed and refused to enforce the arbitration agreement in this wrongful death action filed by Plaintiff on her deceased husband's behalf. We vacate the judgment of the Trial Court and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Vacated; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Kyle E. Hedrick and Glenna M. Ramer, Chattanooga, Tennessee, for the Appellant, Life Care Centers of America, Inc. d/b/a Life Care Center of Jefferson City.

F. Dulin Kelly and Clinton L. Kelly, Hendersonville, Tennessee, for the Appellee, Dorothy Necessary, surviving spouse of Paul G. Necessary, deceased.

OPINION

Background

This is a wrongful death action brought by Plaintiff as the surviving spouse of Paul Necessary (the “Decedent”), who died on January 22, 2004. According to the complaint, the Decedent was suffering from insulin dependent diabetes mellitus, hypertension, chronic obstructive pulmonary disease, and peptic ulcer disease. In September of 2003, the Decedent was admitted to the Life Care Center of Jefferson City (“Life Care”), a skilled nursing home facility. The Decedent was admitted to that facility because “he had recently undergone a right middle cerebral aneurysm clipping after a subarachnoid hemorrhage and was partially paralyzed on his left side and was, therefore, admitted for rehabilitation.” Plaintiff claimed that the Decedent suffered injuries and harm including a severe infection and the development and progression of pressure sores on his body while in Life Care’s care. The Decedent was hospitalized as a result of the alleged injuries and harm. The Decedent’s health deteriorated while in the hospital, and he ultimately died.

Plaintiff filed this wrongful death lawsuit claiming, *inter alia*, that: (a) Life Care breached its duty to the Decedent to provide care, treatment and services within acceptable standards of care for nursing homes; (b) Life Care failed to provide basic and necessary care and supervision; (c) Life Care failed to provide appropriate medical care for Decedent once the significance of his medical condition was discovered; and (d) Life Care failed to administer proper and adequate medications in a timely manner. Plaintiff filed suit on the Decedent’s behalf seeking an unspecified amount of damages for:

- a. Physical disfigurement and impairment up to the time of [Decedent’s] death;
- b. Physical pain and suffering up to the time of [Decedent’s] death;
- c. Mental and emotional anguish up to the time of [Decedent’s] death;
- d. Loss of pleasures and enjoyment of life up to the time of [Decedent’s] death;
- e. Medical expenses up to the time of his death;
- f. The pecuniary value of his life and the value of his spousal consortium pursuant to T.C.A. § 20-5-113 and Jordan v. Baptist Three Rivers Hospital.

Life Care responded to the complaint and admitted that Plaintiff was the Decedent's wife, and that the Decedent died on January 22, 2004. Life Care denied that its employees engaged in any conduct that was negligent or fell below the acceptable standard of care. Life Care later filed a motion to amend its answer claiming that because the parties had entered into a valid arbitration agreement, this lawsuit should be dismissed or stayed pending such arbitration. Attached to the motion was a two-page arbitration agreement (the "Agreement") entered into on August 29, 2003. The Agreement was signed by Plaintiff as Decedent's "Legal Representative." At the top of the two-page, stand-alone Agreement is a caption in large print stating "VOLUNTARY AGREEMENT FOR ARBITRATION." The Agreement begins by explaining what arbitration is and how it works. The Agreement then states:

The parties agree that they shall submit to binding arbitration all disputes against each other and their agents, partners, officers, directors, shareholders, owners, employees, representatives, [and] members ..., arising out of or in any way related or connected to the Resident's stay and care provided at the Facility, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care, including allegations of medical malpractice; any disputes concerning whether any statutory provisions relating to the Resident's rights under Tennessee law were violated; and any other dispute under Tennessee or federal law based on contract, tort, or statute....

The Agreement also has several "acknowledgements" which are located toward the end of the Agreement. These "acknowledgements" include:

The execution of this Arbitration Agreement is voluntary and is not a precondition to receiving medical treatment at or for admission to the Facility.

The Resident and/or Legal Representative understands that he/she has the right to consult with an attorney of his/her choice, prior to signing this Arbitration Agreement.

The Resident and/or Legal Representative understands, agrees to, and has received a copy of this Arbitration Agreement, and acknowledges that the terms have been explained to him/her, or his/her designee, by an agent of the Facility, and that he/she has had the opportunity to ask questions about this Arbitration Agreement.

Each party agrees to waive the right to a trial, before a judge or jury, for all disputes, including those at law or in equity, subject to binding arbitration under this Arbitration Agreement.

The Resident or Legal Representative understands that this Arbitration Agreement may be rescinded by giving written notice to the Facility within 30 days of its execution. If not rescinded within 30 days of its execution, this Arbitration Agreement shall remain in effect for all claims arising out of the Resident's stay at the Facility. If the acts underlying the dispute are committed prior to the revocation date, this Arbitration Agreement shall be binding with respect to said acts.

* * *

THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ THIS ARBITRATION AGREEMENT AND UNDERSTANDS THAT BY SIGNING THIS ARBITRATION AGREEMENT EACH HAS WAIVED HIS/HER RIGHT TO A TRIAL, BEFORE A JUDGE OR JURY, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO ALL OF THE TERMS OF THE ARBITRATION AGREEMENT. (emphasis in the original)

Plaintiff's signature, as the Decedent's "Legal Representative", appears below the last paragraph quoted above.

After Life Care was granted leave to file its amended answer, Life Care filed a motion to enforce the Agreement and to stay the court proceedings. Plaintiff opposed the motion and filed an affidavit in support of that opposition. According to Plaintiff's affidavit:

On or about August 23, 2003, I had to find a nursing home for my husband who needed immediate healthcare treatment. He was about to be discharged from the pulmonary unit of another nursing home, which could not provide the rehabilitation treatment that he needed. It was an emergency. His health insurance carrier was demanding that he leave the pulmonary unit and seek admission elsewhere. Since I was about to leave town on business, everything had to be signed and completed that day at another nursing home or else my husband would not get into a rehabilitation unit.

Although he had a serious physical problem, [my husband] was mentally competent, able to read, and able to write.

Based on my rapid investigation at the time, the Defendant's facility was the only nursing home in this part of the state with the resources and beds available to provide the rehabilitation that my

husband needed. There was no alternative facility able to take my husband.

My husband knew that I was searching quickly for a nursing home or comparable facility in which to place him. I had his authority to sign admitting documents so that he could get the required treatment. However, I never asked for nor obtained his authority: (1) to waive his right to a jury trial, or (2) to submit his claims against the Defendant to arbitration.

Plaintiff then added that it took her twenty to thirty minutes to complete the admission documents. Plaintiff did not read the entire Agreement because “she did not understand much of it [and was] in a hurry to complete the documents” According to Plaintiff, Life Care asked neither for her to have the Decedent sign the Agreement nor for her to explain the document to the Decedent. Plaintiff never told the Decedent about the document, and he never saw the Agreement.

Following a hearing, the Trial Court made the following pronouncement from the bench:

The issue here is simple, that is whether or not Ms. Necessary had the authority to bind her husband to the voluntary agreement for arbitration While that issue is simple, factually it’s complex and the law is complex.... [I]n this case we’re not talking about the competence of Mr. Necessary. We’re talking about the competence of Ms. Necessary, legal competence to enter into an agreement on her husband’s behalf....

[T]he evidence is uncontroverted that ... Mr. Necessary was able to converse in a limited way, that he could write, he could respond, he could communicate. He was not suffering from any disability that would have prevented him from executing these documents.... The testimony of Life Care’s representative, Ms. Capshaw, makes it clear that she had an understanding, sufficient understanding of whether a person has authority, to ask the questions, do you have a power of attorney; is there a durable power of attorney; are you a guardian.

It’s clear from the evidence that at this moment in time that Ms. Necessary had no such legal authority other than the fact she was his wife. And I don’t down-play the role of the husbands and wives in looking after their spouses when it comes time for medical treatment. Ms. Necessary, without seeing those documents, told the Court the admission documents were having to do with his treatment and for the financial arrangements....

What we're dealing with here is a personal right, not one that I could assume as Ms. Necessary's friend or even she can assume on her own, and that is to give up a constitutional right, that is the right to a trial by jury. Was she cloaked with authority? I've never heard of a wife coming in and waiving the right to a jury trial for that spouse, or vice versa. That person has to do that personally, unless they have documentary authority, specific authority to do so. It's much different than assuming a financial responsibility of another person....

The Court is going to find and hold that Ms. Necessary, though she did sign it, lacked the authority, the essential authority to sign a document which gave up a constitutional right, that there was no reason why Life Care could not have made the effort to determine if Mr. Necessary was capable of signing, or that whether Ms. Necessary had the documentary and lawful authority she simply didn't have.

So with respect to the complaint which seeks to recover damages on behalf of Mr. Necessary, the Court finds that the arbitration agreement is not enforceable as to those claims by his estate.

The Trial Court then determined that Plaintiff certainly could enter into an arbitration agreement on her own behalf and ordered Plaintiff's loss of consortium claim to arbitration.

Life Care appeals, claiming the Trial Court erred when it determined that Plaintiff did not have the authority to enter into the Agreement on her husband's behalf. Plaintiff also appeals, claiming that because Plaintiff's loss of spousal consortium claim is not a separate claim in this wrongful death action, the Trial Court erred in treating it as such and ordering that claim to arbitration.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure de novo standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In *Owens v. National Health Corp.*, — S.W.3d —, 2007 WL 3284669 (Tenn. Nov. 8, 2007), our Supreme Court was called upon to decide whether a power of attorney authorized the

attorney-in-fact to enter into an arbitration agreement, and our Supreme Court held that it did. The plaintiff in *Owens* argued on appeal that the power of attorney authorized the attorney-in-fact to make only healthcare decisions, not legal decisions. The Court rejected this argument for several reasons, including the following:

The plaintiff's argument on this issue is faulty in at least one other respect. Her purported distinction between making a legal decision and a health care decision fails to appreciate that signing a contract for health care services, even one without an arbitration provision, is itself a "legal decision." The implication of the plaintiff's argument is that the attorney-in-fact may make one "legal decision," contracting for health care services for the principal, but not another, agreeing in the contract to binding arbitration. That result would be untenable. Each provision of a contract signed by an attorney-in-fact could be subject to question as to whether the provision constitutes an authorized "health care decision" or an unauthorized "legal decision." Holding that an attorney-in-fact can make some "legal decisions" but not others would introduce an element of uncertainty into health care contracts signed by attorneys-in-fact that likely would have negative effects on their principals. Such a holding could make it more difficult to obtain health care services for the principal. And in some cases, an attorney-in-fact's apparent lack of authority to sign an arbitration agreement on behalf of the principal presumably could result in the principal being unable to obtain needed health care services. For example, a mentally incapacitated principal could be caught in "legal limbo." The principal would not have the capacity to enter into a contract, and the attorney-in-fact would not be authorized to do so. Such a result would defeat the very purpose of a durable power of attorney for health care.

Owens, 2007 WL 3284669, at *6.¹ The Supreme Court in *Owens* also observed that its holding was consistent with other jurisdictions, citing, *inter alia*, *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004). In *Briarcliff*, the Alabama Supreme Court was addressing the validity of two separate arbitration agreements, only one of which had been signed by someone with a power of attorney. The Alabama Court ultimately concluded that both arbitration agreements were valid.

Although the present case does not involve a written power of attorney, we think the rationale and holding of *Owens* is nevertheless dispositive of this appeal. In the present case, Plaintiff essentially argues that she had express authority from the Decedent, who was competent

¹ The Supreme Court in *Owens* also held that arbitration agreements in nursing home contracts do not per se violate public policy. *Owens*, 2007 WL 3284669, at *10-11.

to give her that authority, to sign all of the admission documents and make all of the decisions regarding his admission to Life Care's facility - except one: she did not have his authority to sign an arbitration agreement, even though he did not withhold such authority. Such a conclusion would result in the type of "untenable" situation described in *Owens, supra*. Therefore, we hold that Plaintiff, who had the Decedent's express authority to sign the admission documents at the healthcare facility, also had the authority to sign the arbitration agreement on the Decedent's behalf as one of those admission documents².

The judgment of the Trial Court that Plaintiff lacked authority to sign the arbitration agreement on the Decedent's behalf is vacated. This cause is remanded to the Trial Court for further proceedings consistent with this Opinion and the Supreme Court's opinion in *Owens, supra*.

Conclusion

The judgment of the Trial Court is vacated and this case is remanded to the Trial Court for further proceedings consistent with this Opinion and the Supreme Court opinion in *Owens v. National Health Corp.*, — S.W.3d —, 2007 WL 3284669 (Tenn. Nov. 8, 2007), and for collection of the costs below. Costs on appeal are taxed to the Appellee, Dorothy Necessary.

D. MICHAEL SWINEY, JUDGE

² Our resolution of Life Care's issue pretermits the issue raised by Plaintiff.